

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OIL CO., INC.	:	DETERMINATION
D/B/A EAGLE OIL	:	DTA NO. 812595
	:	
for Redetermination of a Deficiency or for	:	
Refund of Tax on Petroleum Businesses under	:	
Article 13-A of the Tax Law for the Fiscal	:	
Years Ended June 30, 1988 and June 30, 1989.	:	

Petitioner, Oil Co., Inc. d/b/a Eagle Oil, One Sheridan Boulevard, Inwood, New York 11696-1807, filed a petition for redetermination of a deficiency or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the fiscal years ended June 30, 1988 and June 30, 1989.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 31, 1994 at 10:00 A.M. The Division of Taxation filed its brief on January 3, 1995. Petitioner filed its brief on January 5, 1995 and this date began the six-month period for the issuance of this determination. Petitioner appeared by Marvin E. Kramer & Associates, P.C. (Marvin E. Kramer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined that petitioner sold petroleum products to a related corporation thereby making the receipts from such sales subject to the tax on petroleum businesses imposed by Tax Law Article 13-A ("gross receipts tax").

FINDINGS OF FACT

On January 15, 1991, the Division of Taxation ("Division") issued to petitioner, Oil Co., Inc. d/b/a Eagle Oil ("Oil Co."), two notices of deficiency for additional tax under Article 13-A

of the Tax Law for the fiscal years ended June 30, 1988 and June 30, 1989. At the hearing, petitioner conceded liability for the additional tax and interest imposed for the period July 1, 1987 through June 30, 1988. The Division waived the imposition of penalty on the amount of this underpaid tax. As a result, this notice was no longer at issue between the parties.

The remaining Notice of Deficiency at issue pertains to the period July 1, 1988 through June 30, 1989 and assesses tax of \$877,313.00, plus penalty and interest. It is based on an audit of Oil Co. to be discussed hereinafter.

Oil Co. was a Connecticut corporation which had filed a trade name certificate and license to do business in New York State. Its trade name was Eagle Oil. Oil Co. was a trader of motor fuel, #2 oil and enhanced diesel and was registered as a terminal operator, diesel distributor and petroleum business (Article 13-A). William S. Nappo was the 100% shareholder of Oil Co.

Eagle Gas, Inc. ("Eagle Gas") was also 100% owned by Mr. Nappo and was a national trademark corporation for the marketing of gasoline. It was a New York corporation but not registered as an Article 13-A petroleum business.

The auditor commenced the audit by reviewing the books and records of Oil Co., which included a purchase journal, sales journal, cash receipts journal, cash disbursements journal, the accountant's records, computer printout of sales, residential certificates, wire agreements between banks and accounts payable information. The auditor requested on several occasions that Oil Co. provide its U.S. Corporation Income Tax Return (Form 1120) for the year ended June 30, 1989 as had been provided for the previous year. However, the return was never provided.

The auditor determined that Oil Co. was making purchases of petroleum from Triton Enterprises, Inc. ("Triton"). These purchases were being carried on the books of Oil Co. as accounts payable. The amount due Triton was wired in payment to Meridien Resources, Inc. ("Meridien") and was recorded on Oil Co.'s cash disbursements journal. The auditor was unable to locate Triton at the address on the invoice, although the audit report does not indicate

what efforts the auditor made to locate Triton. On some of the invoices from Triton to "Eagle Oil", the word "oil" was crossed out and the word "gas" was handwritten over it. The nine invoices that were altered represented approximately 7.5% of the gallons at issue, or 3,468,290 gallons of the total of 46,283,785 gallons transferred. The accounts receivable records of Oil Co. for the period December 1988 through June 1989 indicate that Eagle Gas owed Oil Co. for the same amount of purchases that Oil Co. made from Triton. In addition, the cash receipts journal of Oil Co. states that Eagle Gas paid Oil Co. for this product. Based on this information, the auditor concluded that Oil Co. had sold motor fuel to Eagle Gas.

The petroleum taxes were not paid on the sale of motor fuel from Oil Co. to Eagle Gas nor was the sale reported. The failure of Oil Co. to include the receipts of the sale on its tax return resulted in a substantial underreporting of the gross receipts tax and the imposition of penalty pursuant to Tax Law §§ 315 and 1085(k).

Mr. Nappo testified that Eagle Gas and Oil Co. were independently operated. According to Mr. Nappo, Triton purchased the product from Meridien and resold it to Eagle Gas, which then sold the product to independent distributors. It was Meridien which arranged to deliver the motor fuel to Oil Co.'s terminal on behalf of Triton for its sale to Eagle Gas, and it was the George E. Warren Company which had originally imported the gasoline and then transferred it to Meridien. Mr. Nappo stated that Eagle Gas received invoices from Triton indicating all taxes paid, including the gross receipts tax, and paid for the product by wire transfer. According to Mr. Nappo, the altered invoices represented a clerical error which was corrected by replacing "oil" with "gas". Mr. Nappo and petitioner's representative both knew the president of Triton.

Mr. Nappo explained that the two affiliated corporations had three bank accounts under the following names - Oil Co. d/b/a Eagle Oil, Eagle Gas, Inc. and Eagle Oil oil account - which were used to pay bills. Whenever money was needed, it was taken from whichever account could supply it. This was the source of the intercompany transactions between Oil Co. and Eagle Gas.

Finally, Mr. Nappo explained that it would be an economic disadvantage to have Oil Co.

purchase the product rather than Eagle Gas because Oil Co. is registered under Article 13-A and would have to pay the gross receipts tax twice, assuming it was paid originally by one of the suppliers in the sales chain, and pass it onto the consumer, thereby raising the price of the gasoline. Eagle Gas, a non-13-A company, would not be required to pay the gross receipts tax.

Petitioner introduced into the record of this matter the sales tax returns of Eagle Gas.

The Division contends that the audit revealed that Oil Co. purchased motor fuel from Triton and resold it to Eagle Gas. The sale to Eagle Gas was taxable pursuant to Article 13-A of the Tax Law. Oil Co. failed to report the sale of the product or pay the petroleum business taxes thereon and is therefore liable for the taxes and penalties imposed.

Petitioner claims that it was not involved in the sale between Triton and Eagle Gas. Oil Co. contends that the entries in its books reflect intercompany transactions between itself and Eagle Gas caused by the common use of the bank accounts by the two affiliated corporations. The invoices merely reflect an effort to correct a clerical error when the word "oil" was mistakenly used instead of the word "gas". Finally, Oil Co. points out that it would have been economically disadvantageous for it rather than Eagle Gas to purchase the product at issue.

Petitioner further argues that the auditor should have made additional efforts to find Triton, including contacting Meridien and searching the files of the Department of Taxation and Finance. Petitioner would have also liked to see the auditor contact Meridien to obtain information needed to do a more complete audit and to contact the Department of Taxation and Finance to locate the Form 1120 for the year ended June 30, 1989.

CONCLUSIONS OF LAW

A. During the period at issue, petitioner was registered as a "petroleum business" as that term is defined in Tax Law former § 300(c) of the Tax Law:

"every corporation and unincorporated business formed for, engaged in or conducting the business, trade or occupation of importing or causing to be imported (by a person other than one which is subject to tax under this article) into this state for sale in this state, extracting, producing, refining, manufacturing, or compounding petroleum and every corporation and unincorporated business importing or causing to be imported (by a person other than one which is subject to tax under this article) petroleum into this state for consumption by it in this state"

As a petroleum business, petitioner was liable for the tax imposed by Tax Law former § 301(a) on: (1) gross receipts from sales of petroleum where shipments were made to points within the state; and (2) the consideration given or contracted to be given by it for petroleum which it imported or caused to be imported (by a person other than one subject to the tax imposed by Article 13-A of the Tax Law) into this State for consumption by it in this State.

It is without question that petitioner is liable for the tax assessed if Oil Co. sold the product to Eagle Gas. The law imposing tax on petroleum businesses for the privilege of doing business in the State where shipments are made to points within the State was intended to apply to all competing petroleum businesses and to virtually all petroleum sold in the State (Cibro Petroleum Products v. Chu, 67 NY2d 806, 501 NYS2d 321). It is also without question that no tax is due if the product was sold directly from Triton to Eagle Gas. Therefore, the issue to be resolved is which scenario is supported by the evidence contained in the record.

B. The evidence presented by the Division is sufficient to establish that Oil Co. purchased certain product from Triton and resold it to Eagle Gas. The purchases were paid out of petitioner's cash disbursement book. Certain invoices originally indicated the purchaser to be "Eagle Oil" but were later changed to "Eagle Gas". Payment of the product was made by wire through the account of Oil Co. to Meridien, the supplier to Triton. The accounts receivable book of Oil Co. indicates that Eagle Gas owed Oil Co. for the product and the cash receipts book of Oil Co. verifies that Eagle Gas remitted funds to Oil Co. to pay for these products.

Through Mr. Nappo's testimony, petitioner offered several explanations of the evidence introduced by the Division, attempting to reach a different conclusion than that drawn by the auditor. Mr. Nappo testified that the entries on the books and records of Eagle Gas and Oil Co. are not indicative of sales transactions but of intercompany transactions. He further stated that the auditor looked at only a few invoices that were improperly made out to "Eagle Oil" instead of "Eagle Gas" and based his conclusions for the total amount of product on these invoices. This testimony, without more, is insufficient to rebut the Division's evidence. The books and records of the two corporations showing the frequency of these so-called intercompany

transactions and the remaining invoices involved in the transactions herein indicating Eagle Gas as the purchaser would have bolstered petitioner's position. Furthermore, petitioner has not provided the requested Form 1120 for the year ended June 30, 1989, despite the requests of the auditor. Nor has petitioner presented any of its records to support a conclusion different than that formed by the auditor. Such records would have been helpful in providing support for petitioner's position. However, none were provided.

Finally, petitioner claims that the auditor failed to do a complete and proper audit due to his failure to make further efforts to contact Triton and Meridien. Mr. Nappo was aware of the president of Triton as was petitioner's representative. The president's testimony and Triton's records would have established the purchaser of the product at issue. Yet it appears that no effort was made by petitioner to contact Triton or its president or to provide records and testimony from Triton and its president. The same could be said for Meridien. In addition, Mr. Nappo revealed that George E. Warren Company was the importer of the product at issue, not Meridien. Petitioner did not establish that the petroleum business taxes had been paid on the product thereby putting into doubt that a sale to Eagle Gas was more economically advantageous than a sale to Oil Co.

The failure of petitioner to introduce the documents and testimony discussed above leads to the conclusion that such evidence would not have been supportive of petitioner's position. In addition, the sales tax returns which were introduced are not dispositive of the issues involved herein.

For all the above-stated reasons, petitioner has failed to establish that Oil Co. did not sell the product at issue to Eagle Gas.

C. The petition of Oil Co., Inc. d/b/a Eagle Oil is denied, and the remaining Notice of Deficiency (see, Finding of Fact "1") issued on January 15, 1991 is sustained.

DATED: Troy, New York
August 3, 1995

/s/ Thomas C. Sacca

ADMINISTRATIVE LAW JUDGE